(15)

No. 88-1775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Whether a statement on Petitioner's letterhead which holds him out as being a "Certified Civil Trial Specialist" is commercial speech?

II. Whether the First Amendment to the Constitution of the United States prohibits the Supreme Court of Illinois from disciplining an attorney for holding himself out as being a "Certified Civil Trial Specialist"?

III. Whether the Equal Protection Clause of the Fourteenth Amendment permits the application of a blanket prohibition of Petitioner's statement when attorneys may disseminate information concerning the areas of law in which they practice?

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BRIEF FOR RESPONDENT

Respondent Attorney Registration and Disciplinary Commission of Illinois respectfully prays that this Court affirm the Order and Judgment of the Supreme Court of Illinois dated February 2, 1989.

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Section 16 of the Constitution of the State of Illinois (1970) provides, in part:

> General administrative and supervisory authority over all [Illinois] courts is vested in the Supreme Court [of Illinois] and shall be exercised by the Chief Justice in accordance with its rules.

Rule 2-101(b) of the Illinois Code of Professional Responsibility (79 Ill.2d R. Art. VIII, 2-101(b) (1980)) provides:

> Such communication [publicity and advertising] shall contain all information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive.

STATEMENT OF THE CASE

The facts of this matter are simple and undisputed. *See, Petition for a Writ of Certiorari to the Supreme Court of Illinois* (Pet.) at 3. In 1968, Petitioner was licensed to practice law in the State of Illinois and he is still so licensed. Hearing Transcript (Hr.) at 23; Pet. at 28a. In 1981, Petitioner was certified by the National Board of Trial Advocacy (NBTA) as a civil trial specialist. Hr. at 26; Pet. at 30a.

Beginning in 1983 and continuing to the present, Petitioner has placed the statement "Certified Civil Trial Specialist by the National Board of Trial Advocacy" on his professional letterhead which he uses during the ordinary course of his law practice. Hr. at 20-21; Pet. at 26a-27a.

On or about April 15, 1986, Petitioner received a letter from the Administrator of the Attorney Registration and Disciplinary Commission (hereinafter, "the Administrator") informing him that an investigation had been initiated concerning his use of the statement "Certified Civil Trial Specialist" on his letterhead. Hr. at 19; Pet. at 26a. Petitioner was apprised of the Administrator's concern that his conduct violated Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility. Petitioner was requested to respond, in writing, to the charge. Adm. Ex. 2; Hr. at 19-20; *Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Illinois* (Response) at 2a. Respondent responded to this letter on April 28, 1989. Adm. Ex. 3; Hr. at 21-22; Pet. at 22a-24a.

On April 9, 1987, the Administrator filed a complaint against Petitioner with the Hearing Board of the Attorney Registration and Disciplinary Commission alleging, in part, that Petitioner's letterhead violated Rule 2-105(a)(3). Joint Appendix (J.A.) at 3-4. On August 25, 1987, the Hearing Board issued its report. The Board found that Petitioner had violated Rule 2-105(a)(3) and held additionally, "[Petitioner's conduct] is 'misleading' as our Supreme Court has never recognized or approved any certification process." The Board recommended that Petitioner be publicly censured. Pet. at 20a.

Petitioner filed exceptions to the report of the Hearing Board, and on February 17, 1989, the Review Board of the Attorney Registration and Disciplinary Commission filed a report concurring with the findings of fact and conclusions of law of the Hearing Board and recommending that Petitioner be publicly censured. Pet. at 16a. The Review Board is the appellate board of the Attorney Registration and Disciplinary Commission. Either party may seek, as a matter of right, the review of any recommendation of the Hearing Board. *See* 107 Ill.2d R. 753(e) (1985).

Petitioner filed exceptions to the report and recommendation of the Review Board with the Supreme Court of Illinois. An attorney may except to a decision of the Re-

view Board as a matter of right, if disciplinary action is recommended. *See* 107 Ill.2d R. 753(e)(4) and (5) (1985). On February 2, 1989, the Supreme Court of Illinois issued its opinion in this matter. Pet. at 1a-15a. The Court rejected Petitioner's First Amendment (Pet. at 8a) and Equal Protection (Pet. at 14a) arguments and ordered that Petitioner be publicly censured for his violation of Rule 2-105(a)(3). Pet. at 15a.

The Court found that Petitioner's conduct was misleading for three reasons. The first being that Petitioner's claim impinges upon the inherent authority of the Supreme Court of Illinois to set qualifications for the practice of law. Pet. at 9. The second reason was that his statement leads a reader to believe that the State has sanctioned his claim. *Id.* The third reason was that Petitioner's statement relates to the quality of services he believes he provides. *Id.*

On February 21, 1989, the Supreme Court of Illinois entered an order staying its mandate in this matter, pending Petitioner's appeal to this Court. On May 2, 1989, Petitioner filed with this Court his *Petition for a Writ of Certiorari to the Supreme Court of Illinois.* On July 3, 1989, this Court entered an order granting certiorari.

SUMMARY OF ARGUMENT

Petitioner's argument that his statement concerning certification by a private bar association is not commercial speech has not been properly presented for review. Therefore, this Court should follow the Supreme Court of Illinois and analyze Petitioner's statement as commercial speech.

Regardless, Petitioner's statement that he is a certified civil trial specialist is commercial speech as defined by this Court. In addition to statements which directly propose a commercial transaction, statements which implicitly propose a commercial transaction are commercial speech. Petitioner's statement makes an implicit proposal for a commercial transaction. Therefore, it is commercial speech.

In order to review the First Amendment arguments made by Petitioner, it is important to understand the history of the rules related to attorney advertising in Illinois. Prior to the 1970's, lawyer advertising was strictly limited. In 1976, this Court held that commercial speech was entitled to a limited degree of protection by the First Amendment. In 1977, this protection was extended to attorney advertising. In 1980, the Supreme Court of Illinois promulgated a code of professional conduct in which rules concerning attorney advertising were adopted. Pursuant to the Code, the principal limit placed on attorney advertising was that it not be false, deceptive or misleading. The State encouraged the free flow of commercial information to consumers.

Illinois does prohibit statements in attorney advertising which are inherently misleading. Rule 2-105(a)(3) of the Code prohibits Illinois attorneys from holding themselves out as being either certified or a specialist. Such claims lead the public to believe that the speaker is specially certified or licensed to practice in a certain area of the law by the Supreme Court of Illinois.

In response to Petitioner's First Amendment arguments, a four-part test exists to determine whether state regulation violates the constitutional protection afforded commercial speech. The first part of the test holds that if the speech in question is inherently misleading, the other three parts of the test do not apply. In addition, if a claim

on its face is inherently misleading, the state does not have to prove through direct evidence that the speech actually misled a member of the public.

Petitioner's statement is inherently misleading and can be prohibited for three reasons. First, Petitioner's statement impinges upon the inherent authority of the Supreme Court of Illinois to regulate the practice of law. Second, Petitioner's statement leads the public to believe that the State has sanctioned his claim. Third, the statement contains information concerning the quality of services Petitioner believes he provides.

Finally, the State is not obligated to require that Petitioner include a disclaimer with his statement because the statement is inherently misleading.

In response to Petitioner's Equal Protection argument, Petitioner may be prohibited from holding himself out as being a "Certified Civil Trial Specialist" while attorneys may state that they "limit their practice to" or "concentrate their practice in" any area or field of law in which they practice. This is permissible because the words "limit" and "concentrate" do not connote official sanction. In addition, a blanket prohibition is not objectionable simply because attorneys who accept cases in the areas of admiralty, trademark and patent law can disseminate the specific statements listed in Rules 2-105(a)(1) and (2). Again, the justification for this rule is that none of the specific statements set forth in Rules 2-105(a)(1) and (2) contain the inherently misleading terms "certified" or "specialist."

For the reasons set forth above, the judgment and order of the Supreme Court of Illinois should be affirmed.

ARGUMENT

I.

A STATEMENT ON PETITIONER'S LETTERHEAD WHICH HOLDS HIM OUT AS BEING A "CERTIFIED CIVIL TRIAL SPECIALIST" IS COMMERCIAL SPEECH.

Petitioner's argument that his statement concerning certification by a private bar association is not commercial speech has not been properly presented for review. Therefore, this Court should follow the Supreme Court of Illinois and analyze Petitioner's statement as commercial speech.

Regardless, Petitioner's statement that he is a certified civil trial specialist is commercial speech as defined by this Court. In addition to statements which directly propose a commercial transaction, statements which implicitly propose a commercial transaction are commercial speech. Petitioner's statement makes an implicit proposal for a commercial transaction. Therefore, it is commercial speech.

A. Petitioner's Argument That His Statement Is Not Commercial Speech Has Not Been Properly Presented For Review.

Petitioner argues for the first time before this Court that a statement on his letterhead that he is a certified trial specialist is not commercial speech. Petitioner has never raised this issue before. The commercial nature of the statement on his letterhead was never questioned, argued or briefed. At all prior stages of this proceeding, Petitioner asserted that his statement was constitutionally protected commercial speech. This contention is supported

by a review of the record in this matter. Petitioner has thus failed to properly preserve this issue for review.[1]

During the state court proceeding, Petitioner defended his statement by relying on commercial speech decisions. In 1986, Petitioner was notified by the Administrator that his statement may have been in violation of Rule 2-105(a)(3). Petitioner answered this charge by noting that his statement comported with commercial speech cases decided by this Court in the attorney advertising area. Citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *In re R.M.J.*, 455 U.S. 191 (1982), Petitioner stated that he did "[n]ot believe that Rule 2-105(a)(3) survives these United States Supreme Court decisions." Adm. Ex. 3; Hr. at 21.

Before the Review Board and the Supreme Court of Illinois, Petitioner and the *amici* who filed briefs supporting his position continued to rely on this Court's commercial speech decisions. Neither Petitioner or the *amici* ever argued that his statement was not commercial speech.[2]

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[1] As argued below (*see* Sec. I(B), *infra*), the record shows that Petitioner's statement is commercial speech. This evidence was introduced during the hearing in this matter by the Administrator. As Petitioner did not argue that his statement was not commercial speech, he did not present evidence tending to show that his statement was not commercial speech. Therefore, the Supreme Court of Illinois' implicit determination that Petitioner's statement is commercial speech was proven by clear and convincing evidence, the standard of proof in Illinois attorney disciplinary cases (*see* 79 Ill.2d R. 753(c)(6) (1980)). Such a finding is not against the manifest weight of the evidence.

[2] *See, e.g.*, Petitioner's *Motion to Dismiss* before the Hearing Board of the Attorney Registration and Disciplinary Commission; *Brief of Intervenor or Amicus Curiae* before the Review Board of the Attorney Registration and Disciplinary Commission (which brief, filed by the Illinois Society of the National Board of Trial Advocacy, was adopted by Petitioner as his brief before the Review Board); *Brief and Argument of the Respondent (Petitioner)*

(Footnote continued on following page)

The United States Supreme Court will not decide federal constitutional issues raised for the first time on review of a state court decision. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). The justification for this rule is that questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. *Id.* at 439.

In the case at bar, the record is inadequate to determine that Petitioner's statement is not commercial speech. Petitioner presented no evidence that his speech was not commercial in nature. In fact, the only evidence presented on this issue was by the Administrator who proved that Petitioner circulated his letterhead to clients and other attorneys during the ordinary course of his law practice. Hr. at 21; Pet. at 26a. Petitioner admits that referrals from other attorneys constitute a substantial portion of his business. Pet. at 17. This evidence tends to prove that Petitioner's stationery is commercial in nature.

Petitioner never questioned the Administrator's position that the claim on his letterhead was commercial speech. Petitioner never argued or briefed the issue during the course of the state disciplinary proceeding. Therefore, the Administrator never had an opportunity to present rebuttal evidence concerning this issue or answer any of the arguments Petitioner has raised for the first time before this Court. In addition, Petitioner foreclosed active debate on the issue by defending his statement as if it was commercial speech.

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[2] *continued*
in the Supreme Court of Illinois; *Reply Brief and Argument of the Respondent (Petitioner)* in the Supreme Court of Illinois; *Brief of Amicus Curiae National Board of Trial Advocacy in the Supreme Court of Illinois*; and *Brief of Amicus Curiae Association of Trial Lawyers of America* in the Supreme Court of Illinois.

For the reasons set forth above, an inadequate record is presented for determining that Petitioner's statement is not commercial speech. Therefore, Petitioner has not properly presented the issue for review. The Illinois Court's determination that Petitioner's statement is commercial speech should not be disturbed.[3]

B. Regardless Of Whether Petitioner Has Properly Presented The Issue, Petitioner's Statement Concerning Certification By A Private Bar Association Is Commercial Speech.

Speech which directly proposes a commercial transaction can be regulated as commercial speech. Petitioner suggests, however, that his statement does not directly propose a commercial transaction. Therefore, he argues, his statement is not commercial speech.

Petitioner's reading of this Court's rule is too narrow. The decisions of this Court provide that, in addition to statements which directly propose a commercial transaction, statements which implicitly propose a commercial transaction constitute commercial speech. Using this definition, Petitioner's statement is commercial speech.

[3] This Court has held that when an issue is "only an enlargement of one mentioned [below]," that the new issue raised may be properly decided by this Court. *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899). In this matter, the question of whether or not Petitioner's statement is commercial speech is not an enlargement of the constitutional issue raised by Petitioner below. Therefore, the Court should decline to review the issue of whether Petitioner's statement is commercial speech. *See, also, Morrison v. Watson*, 154 U.S. 111, 115 (1894); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972); and *Illinois v. Gates*, 462 U.S. 213, 217-224 (1983).

1. Petitioner's Definition Of Commercial Speech Is Too Narrow In That The Decisions Of This Court Recognize That Statements Which Implicitly Propose A Commercial Transaction Constitute Commercial Speech.

Petitioner cites this Court's decision in *Central Hudson Gas & Electric v. Public Services Commission of New York*, 447 U.S. 557 (1980), for the rule that commercial speech is defined by the "common sense" distinction between speech "proposing a commercial transaction" and other types of speech. *Brief for Petitioner* at 34. Petitioner cites this Court's recent decision in *Board of Trustees of the State University of New York v. Fox*, 109 S.Ct, 3028 (1989), to demonstrate the continuing applicability of this definition. *Brief for Petitioner* at 34. Petitioner, using the definition set forth in *Central Hudson*, argues that his statement is not commercial speech because the Administrator presented no evidence that Petitioner disseminates his stationery to solicit prospective clients as part of a general advertising campaign. *Brief for Petitioner* at 34-35. Petitioner's argument is in error.

This Court has never intended to limit the definition of commercial speech only to those statements which explicitly propose a commercial transaction. Such a rule would lead to ridiculous results.[4] Instead, statements which implicitly propose commercial transactions can also be categorized as commercial speech.

This Court's decision in *Friedman v. Rogers*, 440 U.S. 1 (1979), illustrates this rule. In *Rogers*, the Court held that the use of a trade name by an optometrist is a form of commercial speech. This Court held:

[4] *See Brief for the Federal Trade Commission As Amicus Curiae* at 11, n.9.

> Once a trade name has been in use for some time, it may serve to identify an optometrical practice and also to convey information about the type, price and quality of services offered for sale in that practice. In each role, the trade name is used as part of a proposal of a commercial transaction. Like the pharmacist who desired to advertise his prices in *Virginia Pharmacy* (*Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976)), the optometrist who uses a trade name "does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters." *Id.*, at 761. His purpose is strictly business. The use of trade names in connection with optometrical practice, then, is a form of commercial speech and nothing more.

Id., at 11.

A trade name does not explicitly propose a commercial transaction. Yet, as determined by this Court, a trade name can implicitly convey information about the type, price and quality of a service offered for sale. Such speech is strictly business. Therefore, it can be regulated as commercial speech even though it does not explicity propose a commercial transaction.[5]

[5] This rule is supported by this Court's decision in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). In *Youngs Drug Products*, the Court found that informational pamphlets distributed by a contraceptive company which contained references to that company's products constituted commercial speech, even though the pamphlets did not explicitly propose a commercial transaction. The Court reasoned that the manufacturer, by reason of its large share of the market, would likely receive a direct financial benefit through promotion of products of a type which the company produced. Therefore, even though an explicit proposal was not made, the pamphlets were held to be commercial speech. *Id.*, at 66-67.

2. Petitioner's Statement Concerning Certification By A Private Bar Association Implicitly Proposes A Commercial Transaction And Is Commercial Speech.

A common sense analysis of Petitioner's statement leads to a conclusion that it implicitly proposes a commercial transaction. Just as the trade name in *Rogers*, 440 U.S. 1, Petitioner's statement is strictly business. Petitioner's statement conveys information about the quality of the services he believes he provides. *See* Sec. II (C)(3), *infra*. Petitioner circulates his letterhead during the "ordinary course" of his law practice. Further, Petitioner uses his letterhead to correspond with clients and other attorneys. Hr. at 21; Pet. at 26a. Thus, Petitioner's statement on his letterhead is commercial speech.

A recent empirical study has found that most attorneys in Illinois, at least in the Chicago area, do not rely on direct commercial advertising to solicit legal business. Davis, Gupta, Rylander and Youngblood, *Attitude and Opinions on Marketing Legal Services: A Survey of Lawyers in Private Practice in Chicago*, 2 Geo. J. Legal Ethics 743, 751-752 (1989).[6] Instead, attorneys utilize referrals from other attorneys and clients to generate business. The conclusion of this study supports a finding that most

[6] Direct attorney advertising is that commercial speech sanctioned by the Supreme Court of Illinois. An attorney may publicize legal services through any commercial publicity or other form of public communication including, but not limited to, newspaper, magazine, telephone directory, radio and television. 107 Ill.2d R. Art. VIII, 2-101 (1985). In addition, lawyers may initiate contact with a prospective client by written communication or mailings which comply with Rules 2-103(b) and (e) of the Illinois Code of Professional Responsibility (107 Ill.2d R. Art. VIII, 2-103(b) and (e) (1985) and *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988). Lawyers may not engage in activity constituting private solicitation of legal services as defined by existing ethical standards. 120 Ill.2d R. Art. VIII, 2-103 (as amended, effective April 10, 1987).

attorneys must rely on their contacts within the community to generate a flow of business. *See Bates*, 433 U.S. at 378. These contacts include lawyers and clients who receive correspondence from Petitioner.

Petitioner's statement represents him to be a specially qualified civil litigator. Petitioner asserts that he has certain qualifications which other lawyers do not possess. Common sense dictates that this self-designated qualification helps Petitioner secure new clients, or at least the referral of new clients, from attorneys who receive his letterhead. In fact, Petitioner admits that "referrals by other lawyers constitute a substantial portion of [my] legal business." Pet. at 17. In addition, it is not unreasonable to conclude that existing clients, believing their attorney specially qualified, might refer friends, coworkers and acquaintances to Petitioner for civil litigation matters based upon his representations concerning certification and specialization. Existing clients themselves may continue an ongoing relationship with Petitioner because of his claimed qualifications or even bring future legal problems to Petitioner for resolution.[7]

Petitioner's statement of certification and specialization need not be as explicit as typical advertisements that appear in the mass media. The substance of the commercial speech contained on Petitioner's letterhead is a subtler form of advertising which is functionally more effective. Petitioner has the direct attention of the recipient of the message. Therefore, Petitioner's statement is at least as effective as most advertisements which unabashedly propose a commercial transaction.

[7] *See Brief for the Federal Trade Commission As Amicus Curiae* at 15, n.12, concerning the Federal Trade Commission's experience with claims which induce consumers to continue their relationship with merchandisers of goods.

In that Petitioner's letterhead is commercial speech, his statement concerning certification and specialization should not be afforded the full protection non-commercial speech receives under the First Amendment. This Court should affirm the state court decision by determining that Petitioner's statement is commercial speech.

II.

THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PERMITS THE SUPREME COURT OF ILLINOIS TO DISCIPLINE AN ATTORNEY FOR HOLDING HIMSELF OUT AS BEING A "CERTIFIED CIVIL TRIAL SPECIALIST" BECAUSE SUCH A STATEMENT IS INHERENTLY MISLEADING.

Prior to the 1970's, lawyer advertising was strictly limited. In 1976, this Court held that commercial speech was entitled to a limited degree of protection by the First Amendment. In 1977, this protection was extended to attorney advertising. In 1980, the Supreme Court of Illinois promulgated a code of professional conduct in which rules concerning attorney advertising were adopted. Pursuant to the Code, the principal limit placed on advertising was that it not be false, deceptive or misleading. The State encouraged the free flow of commercial information to consumers.

Illinois does prohibit statements in advertising which are inherently misleading. Rule 2-105(a)(3) of the Code prohibits Illinois attorneys from holding themselves out as being either certified or a specialist. Such claims lead the public to believe that the speaker is specially certified or licensed to practice in a certain area of the law by the Supreme Court of Illinois.

A four-part test exists to determine whether state regulation violates the constitutional protection afforded com-

mercial speech. The first part of the test holds that if the speech in question is inherently misleading, the other three parts of the test do not apply. In addition, if a claim on its face is inherently misleading, the state does not have to prove through direct evidence that the speech actually misled a member of the public.

Petitioner's statement is inherently misleading and can be prohibited for three reasons. First, Petitioner's statement impinges upon the inherent authority of the Supreme Court of Illinois to regulate the practice of law. Second, Petitioner's statement leads the public to believe that the State has sanctioned his claim. Third, the statement contains information concerning the quality of services Petitioner believes he provides.

Finally, the State is not obligated to require that Petitioner include a disclaimer with his statement because the statement is inherently misleading.

A. The History Of Attorney Advertising And Rule 2-105(a)(3) In Illinois.

Prior to 1977, lawyer advertising was strictly and broadly forbidden throughout the country. Attorneys were generally allowed only to distribute simple business cards, place their name in telephone directories and include their name on certain officially sanctioned law lists. Wolfram, *Modern Legal Ethics*, 775-778 (1986). *See also* Illinois State Bar Association Canons of Professional Ethics, Canon 27 (1937); Chicago Bar Association Canons of Professional Ethics, Canon 27, 27A (1937).

In 1976, this Court held that professional pharmacists could advertise price information even though their interest was purely economic. The Court found that this type of commercial speech is still entitled to a certain

lesser degree of protection under the First Amendment. *Virginia Pharmacy*, 425 U.S. at 761-765. This Court based this rule not so much on the advertiser's right to speak, but society's strong interest in receiving a free flow of commercial information. *Id.* at 764.

In 1977, this Court extended the rule in *Virginia Pharmacy* to attorney advertising, and held that attorney advertising could not be subjected to a blanket prohibition. *Bates*, 433 U.S. at 384. The Court held that attorneys had the right to advertise prices at which certain routine services would be performed. *Id.* at 383. The Court rejected arguments that such advertising would have an adverse effect upon professionalism, be inherently misleading, affect the administration of justice, have an undesirable economic effect on the profession, affect the quality of legal services or be difficult for the states to regulate. *Id.* at 368-379. Yet the Court announced that false, deceptive or misleading advertising could be restrained by the states. *Id.* at 384.

In 1980, the Supreme Court of Illinois adopted the Illinois Code of Professional Responsibility. 79 Ill.2d R. Art. VIII (1980).[8] In promulgating this Code, the State recog-

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[8] On June 3, 1980, the Supreme Court of Illinois adopted the Illinois Code of Professional Responsibility effective July 1, 1980. With revisions and amendments, the 1977 American Bar Association Model Code of Professional Responsibility served as the basis of the new Code, both as to form and substance. 79 Ill.2d R. Art. VIII, Preface, Committee Commentary (1980). The advertising guidelines adopted by the State, however, constituted a clear departure from the rules promulgated by the American Bar Association. *Id.* at Canon 2, Committee Commentary. Illinois acknowledged the First Amendment commercial speech concerns articulated in *Bates*, 433 U.S. 350. In adopting the Code, the State noted that:

> Limiting advertising . . . reflects an antagonism to lawyer advertising on grounds substantially rejected by the *Bates*

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nized the constitutional protections which had been extended to attorney advertising. The Code permits a wide range of advertising options, as to both the manner and content of attorney advertising.[9] As noted by the committee which drafted the Code:

[8] *continued*

decision. To cut short experimentation with lawyer advertising at the preliminary stage could preclude the discovery of those techniques which will most effectively inform the public of the "availability and terms" of legal services.

79 Ill.2d R. Art. VIII, Canon 2, Committee Commentary (1980).

[9] As noted in footnote 6, *supra*, great latitude is allowed the practitioner as to the mode of public communication which can be utilized for advertising purposes. Moreover, Illinois allows a lawyer to communicate the following types of information:

(1) the name of the lawyer;
(2) the lawyer's address and telephone number;
(3) the educational and other background of the lawyer;
(4) the basis on which the lawyer's fees are determined (including prices for specified types of matters for which the lawyer is prepared to perform the necessary work for the client at a stated price, hourly rates, or contingent-fee arrangements), and available credit or other methods of payment;
(5) a description of the types of legal matters in which the lawyer will accept employment and a statement as to whether the lawyer concentrates or limits his practice in one or more particular fields of law;
(6) the lawyer's foreign language ability;
(7) the names and addresses of references and, with their consent, names of clients regularly represented; testimonials of clients, however, as to the lawyer's professional skills or the quality of professional services rendered should not be publicized; and
(8) other information about the lawyer, the lawyer's practice, or the types of legal matters in which the lawyer will accept employment, which a reasonable person might regard as relevant in determining whether to seek the lawyer's services.

79 Ill.2d R. Art. VIII, 2-101(a) (1980). As noted by the State when the rule was adopted in 1980, it is impossible to predict what kinds of information will ultimately prove to be most helpful to potential clients. By not limiting advertising to specified items, the rule

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> [O]pportunities for lawyer advertising should be substantial. Because the lawyer's first amendment rights, the consumer's right to know, and the individual's access to legal services are all involved, restrictions on lawyer advertising should be imposed only to the extent they can be specifically justified to protect the public. Accordingly, the present code does not attempt to list exhaustively the type of information which may be included in advertisements. Nor does it contain detailed and specific prohibitions. Rather, it places primary emphasis, in Rule 2-101(b), on the requirement that any advertisement, regardless of format or content, be true, complete and not misleading.

Id. at Canon 2, Committee Commentary. There is little doubt that Illinois has encouraged the free flow of commercial information. The State did, however, set certain limits on attorney advertising.

Exercising its inherent authority to regulate the practice of law, the Court adopted Rule 2-105(a)(3), the subject of this proceeding. Rule 2-105(a)(3) prohibits attorneys from holding themselves out as being either certified or a specialist. The Committee Comments to Rule 2-105(a)(3) clearly set forth the justification for the rule. "Because the Illinois Supreme Court has not provided for the licensing of lawyers as specialists, care must be taken not to indicate in any way that a lawyer has been certified as a specialist." 79 Ill.2d R. Art. VIII, Canon 2, Committee Commentary (1980).

[9] *continued*

is intended to promote those kinds of disclosures which respond to the desires and needs of consumers of legal services. *Id.*, at Canon 2, Committee Commentary. It is clear that Illinois has taken reasonable steps to ensure the free flow of truthful consumer information. Petitioner's claim that Illinois fosters public ignorance because of its advertising guidelines is wrong. *See Brief for Petitioner*, at 32.

Notwithstanding this exception, wide latitude is granted the attorney seeking to advertise an area of practice. Rule 2-105(a)(3) permits an attorney to "specify or designate *any* area or field of law which he . . . concentrates or limits his . . . practice." (Emphasis added.) The comments to this rule provide that "[s]tatements that a lawyer's practice is 'limited' to certain areas or that the practice is 'concentrated' in those areas provide important information to the public without implying that the lawyer is licensed as a specialist by the Court." *Id.*, at Canon 2, Committee Commentary.[10]

The history of Rule 2-105(a)(3) demonstrates that the rule was promulgated to conform with the constitutional principles expressed in this Court's commercial speech cases. Petitioner chose to hold himself out as being "certified" and a "specialist." His conduct expressly and admittedly violated the rule. *See Brief for Petitioner*, at 3-4. As discussed below, Petitioner's statement is inherently misleading and can be prohibited.

[10] Petitioner argues that Illinois attorneys are allowed to advertise that they concentrate or limit their practice and may make such statements without fulfilling any state or private criteria demonstrating special competence. *See Brief for Petitioner*, at 37. Petitioner asserts that a client will retain an attorney based upon his advertising of a certain concentration of practice, even if the lawyer has no experience in that given field. *Id.*, at 37. In so arguing, Petitioner fails to comprehend the substantive law of professional responsibility. An attorney with no experience in a specific field may not advertise that he or she practices in the area simply because the lawyer is willing to accept clients. *See, e.g., Matter of Zimmerman*, 79 A.D.2d 263, 438 N.Y.S.2d 400 (4th Dept. 1981). Such advertising would clearly be misleading and deceptive. Further, the Illinois Code mandates that lawyers always act competently and with sufficient attention to preparation and presentation. 79 Ill.2d R. Art. VIII, 6-101(a)(1) and (2) (1980).

B. Attorney Advertising Which Is False, Deceptive Or Misleading On Its Face Can Be Prohibited Without A Showing That The Advertisement Actually Misled A Member Of The Public.

This Court has defined a four-part test for determining whether state regulation violates the constitutional protection afforded commercial speech. The first part of this test holds that if the speech is inherently misleading, the other three parts of the test do not apply. In addition, if a claim on its face is inherently misleading, the state does not have to prove through direct evidence that the speech actually misled a member of the public.

The four-part test to determine whether state regulation violates the constitutional protection afforded commercial speech is set forth in *Central Hudson*, 447 U.S. 557. First, it must be determined if the speech is protected by the First Amendment. In order for commercial speech to be protected, it must at least concern lawful activity and not be misleading. *Id.* at 566. Misleading statements are defined as statements which on their face are inherently deceptive or statements where experience has proven that they in fact have misled the public. If the speech fits within either of these definitions, it can be prohibited entirely and the other three parts of the *Central Hudson* test do not apply. *See In re R.M.J.*, 455 U.S. at 203.

If the speech relates to lawful activity and is not inherently misleading, the state still maintains some authority to regulate commercial speech, but the three final parts of the *Central Hudson* test must be satisfied. *See In re R.M.J.*, 455 U.S. at 203. The final three parts of the test are that the state must be advancing a substantial governmental interest by the regulation, the regulation must directly advance the interest asserted and the

regulation may not be more extensive than is necessary to serve that interest. *Central Hudson,* 447 U.S. at 566. As argued below, Petitioner's statement is inherently misleading on its face. Therefore, the final three parts of the *Central Hudson* test should not be applied to the case at bar.

Petitioner argues that the State has not proven that his statement is inherently misleading because no member of the public has, in fact, been misled. *Brief for the Petitioner* at 21-25. The State, though, is not required to prove that any person was actually misled by Petitioner's statement. This Court has held that when the possibility of deception is self-evident, the state does not have to survey the public and produce direct evidence that the statement actually misleads the public. When a statement is facially deceptive, the state may determine on its own that a statement may be restricted because it is misleading. *See FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 391-392 (1965).[11]

[11] The Supreme Court of Illinois is the entity in the best position to determine that Petitioner's statement is misleading because the Court, exercising its inherent authority to regulate the practice of law in Illinois (*see* Sec. II (C)(1), *infra*), regularly makes determinations in attorney disciplinary cases concerning what conduct by attorneys is or is not deceptive. *See, e.g., In re Komar,* 120 Ill.2d 427 (1988). This argument is supported by *FTC v. Colgate-Palmolive Co.,* where this Court held that the FTC was in the best position to determine when a practice was deceptive under Section 5(a) of the FTC Act, 15 U.S.C. 45(a), because the FTC continually deals with cases in this area. 380 U.S. at 385. While the words "deceptive practices" under the Act set forth a legal standard and must, therefore, get their final meaning from judicial construction, the judgment of the FTC is given great weight because a decision on what is deceptive rests so heavily on inference and pragmatic judgment. *Id.* at 385. Here, this Court should depend on the reasonable inferences and pragmatic judgment of the Supreme Court of Illinois.

In the case at bar, Petitioner's statement, as argued below, is facially misleading. Therefore, the Supreme Court of Illinois can prohibit Petitioner from holding himself out as being "certified" and a "specialist" without a showing that his statement actually misled a member of the public.

C. Petitioner's Statement Is Inherently Misleading For Three Reasons: First, Petitioner's Statement Impinges Upon The Inherent Authority Of The Supreme Court Of Illinois To Regulate The Practice Of Law; Second, Petitioner's Statement Leads The Public To Believe That The State Has Sanctioned His Claim; And Third, Petitioner's Statement Contains Unverifiable Information Concerning The Quality Of Services Petitioner Believes He Provides.

The Supreme Court of Illinois found that Petitioner's statement concerning certification and specialization was misleading for three reasons. First, Petitioner's statement impinges upon the inherent authority of the Supreme Court of Illinois to regulate the practice of law in Illinois. Second, Petitioner's statement leads the public to believe that the State has sanctioned his claim. Third, Petitioner's statement concerns an unverifiable claim as to the quality of services Petitioner believes he provides. For these reasons, Petitioner's statement may be prohibited.

1. Impingement Upon Inherent Authority.

States have a compelling interest in regulating the practice of law within their boundaries. The Constitution of the State of Illinois empowers the Supreme Court of Illinois to regulate the practice of law within the State. The Supreme Court of Illinois has exercised this inherent authority in numerous cases. Petitioner's claim of certification and specialty impinge upon this inherent authority. Therefore, Petitioner's statement is inherently misleading.

This Court has held:

> We recognize that the states have a compelling interest in the practice of professions within their boundaries, and as part of their power to protect the public . . . they have broad power to establish standards for licensing practitioners and regulating the practice of professions. * * * The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." (Citations omitted.)

Goldfarb v. Virginia State Bar, 421 U.S. 773, 793 (1975).

Consistent with this compelling interest, the Constitution of the State of Illinois vests general administrative and supervisory authority over all Illinois courts in the Supreme Court of Illinois. This authority is exercised by the Chief Justice in accordance with Court rules. ILL. CONST. art. VI, § 16 (1970). The Supreme Court of Illinois has asserted this inherent authority in numerous decisions.

In *In re Day*, 181 Ill. 73 (1899), a case involving a legislative attempt to establish law license qualifications, the Supreme Court of Illinois held that because an attorney is an officer of the Court, the power to prescribe the qualifications for obtaining a license to practice law is vested exclusively in the Court. The legislative and executive branches of government have no authority to set qualifications. Therefore, the statute was found to be an unconstitutional infringement upon the Court's authority. *Id.* at 96-98.

In *In re Mitan*, 75 Ill.2d 118 (1979), *cert. denied*, 444 U.S. 916 (1979), a case involving attorney disciplinary procedures, the Supreme Court of Illinois held, "This court has the inherent power to regulate the admission of attorneys to the practice of law and to discipline attorneys

who have been admitted to practice before it." *Id.* at 123. The Court held that the disciplining of attorneys is in the nature of an original proceeding in the Court. *Id.* at 123. The Court ruled that technical objections to the practice and procedures of the Attorney Registration and Disciplinary Commission and its boards, cannot bind the Court or limit its authority to act. *Id.* at 124. Thus, the State Constitution and case law make clear that the Supreme Court of Illinois has the sole and inherent authority to set the qualifications to obtain and maintain a license to practice law and to discipline those attorneys who are admitted to practice.

The Illinois Court found that Petitioner's claim of certification by a private bar association "impinges upon the sole authority of this court to license attorneys in this State." *In re Peel*, 126 Ill.2d at 405; Pet. at 9a. This finding is supported by Petitioner's argument that certification by a private bar association, in effect, demonstrates that he is a better or more qualified attorney than others licensed in the State. Petitioner states that his certification is an accurate indicator of "substantial experience" and "competence". *See Brief for Petitioner*, at 22-24, 30.

A greater number of consumers of legal services will seek Petitioner's services because he holds himself out as being better qualified. An attorney who is not certified will receive less referrals because he has not taken the time or paid the expense involved in obtaining a private bar association certification. If Petitioner's claim that privately certified attorneys are better qualified is believed to be true, those attorneys who wish to represent civil litigation clients will have no choice but to be certified by a private bar association to remain competitive. The inevitable result of Petitioner's position would be the creation of a chaotic, unregulated system of civil litigation certification not sanctioned by the State.

The states have the inherent authority to regulate the practice of law within their boundaries and no one has the right to impinge upon that authority as long as the regulation at issue does not violate an individual's constitutional rights. Petitioner's claimed certification is a thinly veiled attempt to invade the province of the Supreme Court of Illinois to set the qualifications for the practice of law.[12] The Supreme Court of Illinois has the duty to protect the public from misleading claims. Therefore, the State is not violating Petitioner's constitutional rights by prohibiting his statement.[13]

[12] There is little doubt that it is the prerogative of a court, federal or state, to adopt rules regarding certification of lawyers after licensing. For example, the United States District Court for the Northern District of Illinois adopted requirements creating a trial bar to improve advocacy. This was an exercise of the inherent rule making authority of the Court. *See Brown v. McGarr*, 774 F.2d 777 (7th Cir. 1985). The rules were adopted by that federal district court in response to Devitt Committee findings regarding the general competency of federal trial lawyers. *Id.* at 778, 780-781. It was within the discretionary authority of the Court, however, and not through the whim of any private organization or association, which resulted in the creation of a certification system in that particular district. To protect society, the state *may* require a licensed professional to satisfy additional conditions after the license is granted. *Dent v. West Virginia*, 129 U.S. 114, 123 (1889) (physician's license) (emphasis supplied). Yet, only the sovereign may sanction such a requirement.

[13] Petitioner relies heavily on the fact that the States of Minnesota and Alabama both determined that an attorney who held himself out as a certified specialist by the NBTA was not engaging in misleading conduct. *See In re Johnson*, 341 N.W.2d 282 (Minn. 1983); *Ex Parte Howell*, 487 So.2d 848 (Ala. 1986). Based upon those decisions, Petitioner argues that his statement is not misleading and should not be subjected to a blanket prohibition. *See Brief for Petitioner*, at 25. Petitioner's argument is in error. First, the record in each case was significantly different from the record in this case. *See* Response, at 21-25. Second, the Supreme Courts of Minnesota and Alabama both have the inherent authority

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2. State Imprimatur.

As to the second reason, state sanction, the Supreme Court of Illinois found:

> [T]he claim of certification by the NBTA . . . is misleading because of the similarity between the words "licensed" and "certified". Webster's dictionary defines "certificate" as "a document containing a certified and usually official statement * * * especially: a document issued by * * * a state agency * * * certifying that one has satisfactorily * * * attained professional standing in a given field *and may officially practice or hold a position in that field.*" (Emphasis added.) (*Webster's Third New International Dictionary*, 366 (1986)). A "license" is defined by Webster's as "a right or permission granted * * * by a competent authority to engage in a business or occupation * * * or to engage in some transaction which *but for such license would be unlawful.*" (Emphasis added.) (*Webster's Third New International Dictionary*, 1304 (1986)). Indeed, it is apparent from the foregoing that the general public could be misled to believe that [Petitioner] may practice in the field of trial advocacy solely because he is certified by the NBTA. In [Petitioner's] letterhead, which we have set out above, directly below the statement concerning certification is the following: "Licensed: Illinois, Missouri, Arizona." The letterhead contains no indication that the licensure was by official organizations which had authority to license, whereas the certification was

[13] *continued*

to regulate the practice of law within their boundaries and to set rules of practice for attorneys who are admitted in their jurisdictions. It is the prerogative of these Courts to allow attorneys to hold themselves out as being certified by the NBTA. It is the prerogative of the Supreme Court of Illinois not to allow such statements. *See* Sec. (C)(1), n.12, *supra*.

> by an unofficial group and was purely a voluntary matter.

In re Peel, 126 Ill.2d at 405-406; Pet. at 9a.

The Supreme Court of Illinois has the inherent authority to regulate all facets of the practice of law in Illinois. Petitioner's statement would mislead the public into believing that the State has placed its imprimatur on Petitioner's claimed certified specialty. This is especially true, as the Court noted, because Petitioner places his claim in close proximity to official licensures on his letterhead. Because the letterhead makes no distinction between claims which are official and claims which indicate a purely voluntary association with a private bar group, Petitioner's statement is misleading.[14]

The State has specifically determined that speech is not protected because it is misleading. *See* 79 Ill.2d R. Art. VIII, 2-101(b) (1980). The State may, therefore, discipline Petitioner. The State's decision is supported by *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). In *Zauderer*, this Court reviewed an attorney's advertisement in which he sought contingent fee clients by advertising, "If there is no recovery, no legal fees are owed by our clients." *Id.* at 631. The Court found that the State could require the attorney to publish a disclaimer with the advertisement stating that the client would be liable for the costs of the action, whether successful or

[14] The operative word in the definition of certificate, which makes it synonymous with license, is "officially". A license is granted by an entity empowered with the authority to lawfully regulate the endeavor. A certificate or certification signifies that the holder may officially practice or hold a position in that field. When the entity empowered with the authority to regulate the endeavor sanctions the activity, it is official.

not. *Id.* at 652. The Court found that because the advertisement made no mention of the difference between legal fees and costs, the advertisement would mislead the public into believing that hiring the attorney would be financially risk-free. This Court held:

> The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is commonplace that members of the public are often unaware of the technical meanings of such terms as 'fees' and 'costs'—terms that in ordinary usage, might well be interchangeable.

Id. at 652.

The Supreme Court of Illinois reasonably determined that the public would be misled because the public would not know the difference between the technical terms "licensed" and "certified". The public, when reading Petitioner's statement, is unaware that there is no official certification authority in the jurisdiction in which Petitioner is licensed. In fact, because the words "licensed" and "certified" are synonymous, the public is led to believe that Petitioner was officially certified and the State had placed its imprimatur upon Plaintiff's claim. As there is no dispute that this is not the case, Petitioner's statement is inherently misleading.[15]

[15] The contention that the public would be confused because they would not know the difference between the technical terms "licensed", "certified" and "specialist" is supported by a Report of the American Bar Association Standing Committee on Ethics and Professional Responsibility which was recently adopted by the House of Delegates and cited by the Illinois Court in its decision. *See, In re Peel*, 126 Ill.2d at 409-410; Pet. at 12a-14a. The Report found that the term "specialist" had acquired a secondary meaning. Members of the public believe that when a professional holds himself out as a specialist, he officially received the right to do so by some governmental agency empowered to make that designa-

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3. Claim Of Quality.

As to the third reason Petitioner's statement is inherently misleading, the Supreme Court of Illinois found that Petitioner's claim related to the quality of the services which he believes he provides. The Court found:

> [T]he claim that [Petitioner] is certified as a civil trial specialist by the NBTA is misleading because it tacitly attests to the qualifications of [Petitioner] as a civil trial advocate. Because not all attorneys licensed to practice law in Illinois are certified by the NBTA, the assertion is tantamount to a claim of superiority by those attorneys who are certified.

In re Peel, 126 Ill.2d at 406; Pet. at 9a.

This Court in the *Bates* decision held:

> [B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services—a matter which we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. (Citations omitted.)

433 U.S. at 384.

Petitioner's statement concerns the quality of services he believes he provides. Statements relating to the quality of legal services are difficult, if not impossible, to verify

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[15] *continued*
tion. As the facts in the case at bar illustrate, not all specialists, and the argument can be expanded to include those individuals holding themselves out as being certified, have in fact had governmental imprimatur placed upon their claim. This supports the State's claim that Petitioner's statement is misleading.

or measure by objective standards. 79 Ill.2d R. Art. VIII, Canon 2, Committee Commentary (1980). Petitioner argues that his claim is easily verifiable and contains completely accurate factual information, unlike other claims of quality. Therefore, Petitioner argues his statement as to quality is not misleading. *Brief for Petitioner* at 22-25.

The fact that certification by the NBTA is readily verifiable is not so clear from the record. In fact, the record is clear that there is substantial confusion as to what the exact requirements are for being certified by the organization. Indeed, the Supreme Court of Illinois found that Counsel supporting Petitioner's position during the state court proceeding could not agree on the qualifications. *Peel*, 126 Ill.2d at 406-407; Pet. at 10-11a.[16] If counsel

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[16] The Supreme Court of Illinois found that each advocate representing Petitioner's interests articulated a different set of qualifications for being certified by the NBTA. Petitioner stated, "[A]n attorney must have * * * acted as lead counsel in at least 40 jury trials carried to verdict, or 100 non-jury matters tried to conclusion, successfully score on a six-hour written examination, maintain continuing participation in continuing legal education, and obtained other standards and achievements." *In re Peel*, 126 Ill.2d at 406-407; Pet. at 10a-11a. The Association of Trial Lawyers of America, in an *amicus* brief, stated the primary requirements for certification "are that the attorney have at least five years experience in civil practice, including experience as lead counsel in at least 15 major cases tried to verdict." *Id.* The NBTA, who also filed an *amicus* brief, stated that an attorney must:

> [Appear] as lead counsel in not less than 15 complete trials of civil matters to verdict or judgment, including not less than 45 days of full trial; at least five of these trials must be to a jury. In addition, applicants must have appeared as lead counsel in at least forty additional contested matters involving the taking of testimony. These may include trials, evidentiary hearings, depositions, or motions heard before or after trial.

Id.

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representing Petitioner's interests could not define the qualifications for the very organization whose *bona fides* they claim are without question, it is impossible for the public to verify the meaning or usefulness of a certification by a private bar association.[17]

Petitioner's statement is commercial speech which he places on his letterhead to attract referral of clients and to impress upon the reader the quality of services Petitioner believes he provides. Petitioner's statement is an unverifiable claim concerning the quality of services he provides. Therefore, the claim is inherently misleading and may be prohibited.

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[16] *continued*

In conclusion, the Court puzzled:

> Does certification mean that the attorney has tried 40, 15, or 5 jury trials to verdict? Does the requirement concerning 40 contested matters refer to 40 jury cases tried to verdict, as the [Petitioner] asserts, or simply 40 hearings on motions, depositions and non-jury trials, as the National Board of Trial Advocacy claims? If certification conveys such a varied and uncertain understanding as to its meaning to the attorneys who are in this case contending for the cause of certification, and who should be knowledgable as to its meaning, how much more confusing is the statement that an attorney is certified as a trial specialist likely to be to the general public?

Id.

[17] Questions arise concerning the difficulty of the Association's written test, the integrity of the grading system, the evaluation of qualifications and the standards by which these qualifications are set. The Bar Examination in Illinois is under the direct control of the Supreme Court of Illinois. *See* 107 Ill.2d R. 701-706 (1985). The Court will never be able to fully regulate these variables set by a private bar association.

D. The State Is Not Obligated To Require That Petitioner Include A Disclaimer With His Statement Because The Statement Is Inherently Misleading.

The state may require that a speaker include a disclaimer with the commercial speech that is potentially misleading, rather than issue a blanket prohibition. When the speech is inherently misleading, however, the speech may be subjected to a blanket prohibition. Petitioner's statement is inherently misleading. Therefore, it can be subjected to a blanket prohibition and a disclaimer, as argued by Petitioner, is not required.

When commercial speech has a potential to mislead, the speech may not be subjected to a blanket prohibition if it can be presented in a manner that is not misleading. In other words, if a disclaimer can cure the statement's potential for deception, it cannot be prohibited entirely. The state can only require that the speaker clarify or further explain his statement in a manner that vitiates the potential to mislead. If the statement is inherently misleading, the state may subject it to a blanket prohibition. *See Bates*, 433 U.S. at 375; *In re R.M.J.*, 455 U.S. at 203.[18]

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[18] Rule 2-101(b) of the Illinois Code of Professional Responsibility requires that all publicity and advertising "contain all information necessary to make the communication not misleading and shall not contain any false of misleading statement or otherwise operate to deceive." 79 Ill.2d R. Art. VIII, 2-101(b) (1980). This rule comports with the holdings in *Bates*, 433 U.S. at 375, and *In re R.M.J.*, 455 U.S. at 203. If an attorney's advertisement has the potential to mislead, he is required to include a disclaimer with his statement. If the statement is inherently misleading, he is prohibited from disseminating it. Originally, Petitioner was charged with violating the general provisions of Rule 2-101(b). *See Complaint*, par. 4(b); J.A. at 4. The Hearing Board found that Petitioner violated the specific provisions of Rule 2-105(a)(3) and en-

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As argued above, Petitioner's statement is inherently misleading for three reasons.[19] Therefore, the State can subject Petitioner's statement to a blanket prohibition, rather than require a disclaimer as argued by Petitioner. *See Brief for Petitioner*, at 26-27. The State is not obligated to require that Petitioner include a disclaimer with his statement.[20]

III.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT THE APPLICATION OF A BLANKET PROHIBITION OF PETITIONER'S STATEMENT BECAUSE ATTORNEYS MAY DISSEMINATE NON-MISLEADING INFORMATION CONCERNING THE AREAS OF LAW IN WHICH THEY PRACTICE.

Petitioner may be prohibited from holding himself out as being a "Certified Civil Trial Specialist" while attorneys may state that they "limit their practice to" or "concentrate their practice in" any area or field of law in which they practice. This is permissible because the words "limit" and "concentrate" do not connote official sanction.

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[18] *continued*
gaged in conduct which was inherently misleading. *See Report of the Hearing Panel*, Pet. at 19a-20a. Petitioner's violation of Rule 2-101(b) is not before this Court.

[19] *See* Sec. II (C), *supra*.

[20] Petitioner has never indicated that he would include a disclaimer with his statement. In addition, the parties have not previously presented evidence on, argued or briefed this issue. Therefore, the record is insufficient to review this question, much as the record is insufficient to determine that Petitioner's statement is not commercial speech. *See* Sec. I (A), *supra*. Regardless, due to the inherently misleading nature of Petitioner's statement, it is extremely doubtful that a disclaimer could be created that could make the statement not misleading.

In addition, a blanket prohibition is not objectionable simply because attorneys who accept cases in the areas of admiralty, trademark and patent law can disseminate the specific statements listed in Rules 2-105(a)(1) and (2). Again, the justification for this rule is that none of the specific statements set forth in Rules 2-105(a)(1) and (2) contain the inherently misleading terms "certified" or "specialist."

A. Claims Of Concentration And Limitation Are Permissible Because They Are Not Misleading.

Petitioner argues that the provision of Rule 2-105(a)(3) allowing attorneys to state that they "concentrate their practice in" or "limit their practice to" areas of the law in which they practice violates the Equal Protection Clause of the Fourteenth Amendment. Petitioner states that the distinction between using the terms specialization/certification and the terms limitation/concentration is "utterly irrational and furthers no legitimate state interest." *Brief for Petitioner* at 37. Petitioner's argument is in error. There is a highly rational basis for the distinction drawn by the rule. This distinction promotes a substantial state interest in providing a free flow of non-misleading commercial information to potential consumers of legal services.

The words "concentrate" and "limit" have not obtained secondary meanings such as the terms "certified" or "specialist". *See* Sec. II (C)(2), n.15, *supra*. Because the words "limit" and "concentrate" do not connote impingement upon the inherent authority of the State to regulate the practice of law, imply State imprimatur or constitute an unverifiable statement of quality, the terms "concentrate"

and "limit" are not inherently misleading.[21] Therefore, the terms "concentrate" and "limit" cannot be subjected to a blanket prohibition. Use of the terms "concentrate" and "limit" also comports with the last three parts of the *Central Hudson* test.[22]

First, a substantial state interest is required. The interest in this matter is defined by the Committee Comments to the rule:

> [A] lawyer who spends a substantial portion of time working in a few areas [may] identify those areas so that the public can have the benefit of that information. Obviously, identification of lawyers who work in a particular area in which the client is interested is useful information which should be disseminated. Statements that a lawyer's practice is "limited" to certain areas or that the practice is "concentrated" in those areas provide important information to the public without implying that the lawyer is licensed as a specialist by the court.

79 Ill.2d R. Art. VIII, Canon 2, Committee Commentary (1980).

Providing non-misleading information to consumers interested in obtaining a lawyer who practices in a certain area of the law, is clearly and directly advanced by the concentration and limitation provision of Rule 2-105(a)(3). In addition, the regulation is narrowly tailored to serve the State's interest.[23] Therefore, the certification and limitation provision of Rule 2-105(a)(3) does not violate Petitioner's right to Equal Protection pursuant to the Fourteenth Amendment.

B. Claims Concerning Limitation Of Practice In Admiralty, Trademark And Patent Law Are Permissible Because They Are Not Misleading.

Rules 2-105(a)(1) and (2) allow attorneys who practice in the areas of admiralty trademark and patent law to indicate that they will accept cases in such fields by disseminating certain carefully worded phrases.[24] None of

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[21] The terms "concentrate" and "limit" do not impinge upon the inherent authority of the state to regulate the practice of law because they are not an attempt by the speaker to set a qualification for the practice of law in Illinois. *See* Sec. II (C)(1), *supra*. Instead, the terms simply indicate that the speaker has decided to concentrate or limit his practice in a certain substantive area of the law. The terms do not imply State sanction. *See* Sec. II (C)(2), *supra*. Finally, the terms do not constitute an unverifiable statement of quality by the speaker. While a reader may infer from a statement concerning concentration or limitation that the speaker provides better quality services, whether an attorney concentrates or limits his practice to a certain area is a factual question which is easily verifiable. *See Matter of Zimmerman*, 79 A.D.2d 263, 438 N.Y.S.2d 400 (discussed in detail in Sec. II (A), n.10, *supra*). In other words, claims of concentration and limitation can be readily determined. *See* Sec. II (C)(3), *supra*.

[22] *See* Sec. II (B), *supra*. The final three parts of the *Central Hudson* test are that the state must be advancing a substantial state interest by the regulation, the regulation must directly advance the interests asserted and the regulation may not be more extensive than necessary to serve that interest. 447 U.S. at 566.

[23] *See Board of Trustees of the State University of New York v. Fox*, wherein this Court held that the narrowly tailored test set forth in *Central Hudson*, *supra*, does not mean that the least severe regulation that will achieve the desired end is required. Rather, only a reasonable fit between the government's interest and the means chosen to service that interest is required. 109 S. Ct. at 3035. It is clear that the regulation at hand is a reasonable fit between the asserted interest and the means chosen by the State to service that interest.

[24] Attorneys who are admitted to practice before the United States Patent and Trademark office may use the designations "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of these terms on his, let-

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these phrases contain the inherently misleading terms "certified" or "specialist". *See* Sec. II (C), *supra*.

The substantial state interest furthered by these regulations and the justification for these rules are the same as asserted for claims of concentration and limitation. *See* Sec. III (A), *supra*. In addition, the state court found that the specific distinctions set forth in Rules 2-105(a)(1) and (2) were justified because the public has historically had difficulty finding attorneys who practice in the areas of admiralty, trademark and patent, while locating an attorney who is a civil trial advocate does not involve the same difficulty. *In re Peel*, 126 Ill.2d at 410-411; Pet. at 14a (citing *Silverman v. State Bar*, 405 F.2d 410 (5th Cir. 1968), which supports the position that attorneys practicing in admiralty, trademark and patent have always been difficult for the public to locate).

The regulations contained in Rules 2-105(a)(1) and (2) were promulgated with a substantial state interest as their basis. The rules themselves directly advance this interest and are closely tailored and narrowly drawn. Therefore, the specific provisions in Rules 2-105(a)(1) and (2) do not violate Petitioner's right to Equal Protection pursuant to the Fourteenth Amendment.

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[24] *continued*

terhead and office sign. 79 Ill.2d R. Art. VIII, 2-105(a)(1) (1980). A lawyer engaged in the trademark practice may use the designations "Trademark," "Trademark Attorney" or "Trademark Lawyer," or any combination of these terms in any form of permissible advertising. 79 Ill.2d R. Art. VIII, 2-105(a)(2) (1980). A lawyer engaged in the admiraltry practice may use the designations "Admiralty," "Practice in Admiralty" or "Admiralty Lawyer," or any combination of these terms in any form of permissible advertising. *Id.* These claims are not misleading and are easily verifiable. *See Matter of Zimmerman*, 79 A.D.2d 263, 438 N.Y.S.2d 400 (4th Dept. 1981) (discussed in detail in Sec. II (A), n.10, *supra*).

CONCLUSION

For the foregoing reasons, the judgment and order of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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